SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1918.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and WABASH RAILWAY COMPANY,
Petitioners,

vs.

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL, F. C. HUBBELL and F. M. HUBBELL & SON,
Respondents.

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PETITION FOR WRIT OF CERTIORARI.

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Now come the Chicago, Milwaukee & St. Paul Railway Company, hereinafter called the "St. Paul Company", and the Wabash Railway Company, hereinafter called the "Wabash Company", and respectfully petition this Court to grant a writ of *certiorari* under Section 240 of the Judicial Code to the Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom, for review here, the record in the cause therein pending numbered 4885 in equity, wherein your petitioners are appellants, and the Des Moines Union Railway Company, F. M. Hubbell, F. C. Hubbell and F. M. Hubbell & Son are appellees,

also the record in the cause therein pending numbered 4886, wherein your petitioners are appellees, and said Des Moines Union Railway Company (hereafter called the Des Moines Company), F. M. Hubbell, F. C. Hubbell and F. M. Hubbell & Son are appellants (a copy of the records being presented herewith), and state:

This is a bill in equity filed in the District Court for the Southern District of Iowa to enjoin the respondents, F. M. Hubbell and F. C. Hubbell, from causing the Des Moines Company (which they dominate), to exclude petitioners from the use and occupation of the parts of their railroads and all their terminal facilities located in Des Moines, Iowa, which petitioners and their predecessors acquired and developed and have operated in the name and under the management of that company as their agent, and to recover income derived from the use thereof now in its treasury (55; 119).*

The railroads and terminal facilities in controversy include a double track railroad extending from a connection with the railroad of the Wabash Company at its terminus at the east limits of the City of Des Moines through the business center of Des Moines over a bridge across the Des Moines River to a connection with the tracks of the railroad of the St. Paul Company at its terminus at Sixteenth street near the western limits of Des Moines, a distance of about three miles; passenger depot, freight

*Note: Figures in parenthesis throughout this petition refer to pages of the record and where double pages appear they refer to the pages stamped by the clerk in heavy black figures above the pages originally printed.

depot, sidetracks, switches, roundhouses, turntables and industrial tracks connecting with all industries of importance in Des Moines, together with switch engines and other incidental facilities (1047) (183) (402). The original outlay for the ground and right-of-way was $461,257.00 (478-479) and F. M. Hubbell estimated the value of the property at $2,000,000 (1054).

All of the judges of the Court of Appeals were of opinion that petitioners are entitled to the income in the treasury of the Des Moines Company and that they and their predecessors acquired and owned the joint railroad and terminal facilities, but two of the judges were of opinion (2086-2119) that the petitioners and their predecessors had "gradually **let slip** from them" the joint railroads and terminal facilities (2115) notwithstanding "there is nowhere any indication that the railways **intended** any such result and yet such, in our judgment, is the result. This **unexpected outcome** was the product of several circumstances". The other Judge was of a contrary opinion (2120-2126), but the Court ordered and adjudged that petitioners are entitled to recover the income, and that the Des Moines Company is the owner absolutely of the joint railroads and terminal facilities and that petitioners are not entitled to use and occupy them (2126).

The bill is **based on:**

(1) A contract dated January 2, 1882, between the Des Moines & St. Louis Railroad Company, predecessor in title of the Wabash Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, predecessors in title of the St. Paul Company, and How and

Dodge, their trustees, which stated that said predecessor companies (hereinafter sometimes called the railway companies) "are engaged in the construction of railways converging at the City of Des Moines", and had agreed to extend their railroads into and through Des Moines by constructing joint railroads, and to develop joint terminal facilities therein on ground they had purchased for that purpose and that such joint railroads and terminal facilities should be held in perpetuity **"subject to the joint use and occupation of all said railway companies"** at actual cost to be shared in accordance with use (120-122).

(2) Articles of incorporation of the Des Moines Company made by F. M. Hubbell and other authorized representatives of the railway companies, on December 10, 1884, which after setting out the above contract *verbatim* provided among other things (Art. II) that, **"all the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, 1882"** (123-129).

(3) Resolutions of the railway companies directing that their joint railroads and terminal facilities be conveyed to the Des Moines Company **"to carry out the purposes of said contract of January 2nd, 1882"** (Ex. D, 131-132; Ex. F., 134-135; Ex. G., 135, 136, 137), and the resolution of the Des Moines Company "**that this Company accepts the transfer and management and operation of said property and assumes control thereof from this date * * * and that it hereby instructs its president to make such order as may be necessary to render such control and management effective as provided in said contract**" (Ex. C, 130-131).

(4) A supplemental agreement dated May 10, 1889, between the railway companies and the Des Moines Company, which covered in detail the operation of the joint railroads and terminal facilities until May 1, 1918 (150-159).

Deeds were made to the Des Moines Company (143-150, 455-459), which made its mortgage (459-472) and issued its bonds to reimburse the railway companies and their trustees for the outlays as provided in the contract of January 2nd, 1882 (478-479). F. M. Hubbell, the attorney and agent of the railway companies, at the inception of the terminal enterprise (396-400), purchased the joint right-of-way and terminal ground (1045-1046), became interested in and dominated the companies, predecessors of the St. Paul Company (1096-1097, 1100-1101); was at all times a director and secretary of the Des Moines Company (998) and an officer and director of each of the railway companies (1041, 1042, 1043, 1044). The officers and agents of the company predecessor of the Wabash relied on F. M. Hubbell to promote its interests as well as the interests of the companies he dominated (234, 361-365), but instead he acted adversely and in his individual interest by acquiring alleged assignments of the alleged rights of the company predecessor of the Wabash to three-eighths of the unissued stock of the Des Moines Company under an agreement that it would be sold "only to a railway company who will join with the Wabash in making a contract with the Des Moines Union guaranteeing interest on the bonds, operating expenses, etc." (1059-1060, 1061-1063, 1070, 1602-1603), and that the articles would not be amended otherwise than to permit the holder of one-eighth of stock to elect a director (1601-1602),

which stock was finally transferred to the company he dominated (1064-1065, 1069-1070, 1089). He caused the records of the Des Moines Company, without knowledge or consent of the railway companies (231-235, 364-365, 1090-1094, 1601-1602) to purport to show that at a meeting of its stockholders, when in fact no stock had been issued (1068, 1087) or subscribed (1065, 1087, 1090) its articles of incorporation had been amended so as to eliminate all the rights and interests of the railway companies in their joint railroads and terminal facilities and create a colorable claim that the Des Moines Company had acquired them (488, 494), and caused 4,000 shares of its stock to be issued under article III of the alleged amended articles (1068-1069), which falsely stated the stock would be issued in payment for the property, bonds having been previously issued for that purpose (478-479); the stock was therefore issued without consideration (348-349); by mesne assignments F. M. Hubbell and his son, F. C. Hubbell, acquired individually five-eighths thereof or 2,500 shares from the company they dominated in a trade at the alleged price of ten cents on the dollar (1016, 1042, 1064, 1065, 1482, 1483, 1484, 1096, 1097, 1150, 1151) in violation of the agreement that the stock would be sold "only to a railroad company who would join with the Wabash in making a contract with the Des Moines Company, guaranteeing interest upon the bonds, operating expenses, etc." (1059, 1060, 1061, 1070), and by means of said stock they controlled the majority of the directors (themselves and their dummies) of the Des Moines Company (190), and caused it to set up said claim adverse to petitioners.

One-fourth, or 1,000 shares, of the stock is now held

by the St. Paul Company, five-eighths, or 2,500 shares, by F. M. Hubbell and son (190), and one-eighth, or 500 shares, by the Wabash Company (169).

Before the Hubbells acquired five-eighths of the stock affidavits were made by Howe in 1889 (501); by Seely, general superintendent in 1890 (502); by Cummins, vice-president, in 1891 (503); by respondent F. C. Hubbell, president, in 1892 (504), and by Cummins (attorney for the Des Moines Company and the railway companies and the personal attorney of F. M. Hubbell) (1059), as vice-president of the Des Moines Company, February 28th, 1893, to the Council of the State of Iowa (505), that the Des Moines Company "is simply a representative company acting as an agency at Des Moines for the" railway companies, "performing all the necessary work for them and charging each road its due proportion of the expense thereby incurred, etc., at actual cost".

The Hubbells acquired five-eighths of the stock of the Des Moines Company January 29th, 1894 (1482-1483-1484) and on February 16th, 1894, Cummins, as vice-president of the Des Moines Company, made affidavit to the Council of State of Iowa that "the Des Moines Company is the owner of the property hereinbefore described, etc." (506). The first knowledge either of the railway companies or their successors had of the claim of respondents Hubbell that the Des Moines Company had acquired the joint railroads and terminal facilities was in October, 1905, when they threatened to cause the Des Moines Company to exclude petitioners from the use and occupation thereof at the expiration of the supplemental or operating agreement, to wit, on May 1, 1918, and to

withhold such income (328-329), whereupon in due time petitioners brought this suit (3).

As above stated the Judges of the Court of Appeals concurred in holding (see majority opinion 2086-2119, and dissenting opinion 2120-2126) that the petitioners are entitled to the income in the treasury of the Des Moines Company and that the predecessors of the petitioners acquired and owned the joint railroads and terminal facilities.

But Judge Stone (Judge Smith concurring, and Judge Hook dissenting), held:

First. That the deeds to the Des Moines Company vested in it the absolute title to all interest in the joint railroads and terminal facilities (2094-2110), contrary to *(a)* the contract of 1882 that they should be held subject "to the joint use and occupation of all said railway companies" (120); *(b)* the articles of incorporation that "all the powers exercised by this company shall be in accordance with the terms of the aforesaid contract" (127); *(c)* the resolutions of the railway companies that their joint railroads and terminal facilities should be conveyed to the Des Moines Company "to carry out the purposes of the said contract" (131-139); *(d)* the resolutions of the Des Moines Company "that this company accepts the transfer and management and operation of said property * * * and assumes control thereof * * * and it hereby instructs its president to make such order as may be necessary to render such control and management effective as provided in said contract" (130-131); *(e)* the understanding of the persons who actively participated in the transactions as shown by the affidavits made to the Council of State (501-505); *(f)* the decision of this court in Joy *et al* v. St. Louis (138 U. S.

l. c. 38). *(g)* public policy as announced in Central Transportation Company v. Pullman Company (139 U. S. 28-49) and confirmed by all subsequent cases, that a railway corporation can not alienate or convey its right to use its railway in whole or in part without the express consent of the state under whose franchise it was created and acquired and the laws of Iowa do not permit by sale, lease or otherwise, the dismemberment of a railroad or a separation of a railroad or any part from the franchise under which it was created or acquired (Section 2066 of the Iowa Code, 1897—same as Section 1300 of the Code of 1873; O'Connor v. Tennessee Central Railway, 109 Fed. Rep. 935); *(h)* the contract with the state of Iowa which arose from public taxes voted to the companies' predecessors to the St. Paul Company "for the purpose of aiding" them in constructing a railroad "to a connection with the line owned or operated by the Wabash, St. Louis & Pacific Railway Company (788-827); *(i)* and the condition on which they were accepted in writing (796-799) pursuant to which the railroad was constructed to Fourth street to a connection with the Wabash road (823), whereby the predecessors of the St. Paul Company and their successors became obligated to the state to perpetually maintain and continuously operate the same (State against Central Iowa Railway Company, 71 Iowa 410); and *(j)* contrary to the public policy of the State of Iowa announced in said section 2066, which reads as follows:

> "**Sale or Lease of Railroad Property—Joint Arrangement.** Any railroad corporation may sell or lease its property and franchises to, or make

joint running arrangements not in conflict with law, with any corporation owning or operating any connecting railway, and any corporation operating the railway of another shall be liable in the same manner and extent as though such railway belonged to it."

This statute prohibits by implication the dismemberment or breaking up of a railroad or the franchises under which it was constructed and permits a railroad and franchises to be disposed of only as a unit or entirety.

Second. That the articles of incorporation of the Des Moines Company made it a mere agency for the railway companies and gave them complete control and domination over its affairs, which enabled them to enjoy the use and occupation of the joint railroads and terminal facilities at cost, in accordance with their respective use (2110); but that this control and all the rights growing out of it were "later relinquished" to the Des Moines Company (2110) by the alleged amendments to the articles which "took away all control by the railway companies as such over the action of the terminal company * * * and all influence of the 1882 contract as embodied in the articles of incorporation" (2113), and that while "the amendments were never properly adopted" that question was "not open to complainants" (2110) because they were guilty of laches (2113-2114-2115) on the grounds:

(1) That "Hubbell was willing to purchase" the stock of the Des Moines Company "if the control of the railways as such given in the articles was removed; the articles were amended, removing Hubbell's objection; the purchase was made" (2113);

contrary to *(a)* the 16th paragraph of the answer wherein "these respondents aver that said stock was acquired long after the amendments to the articles of incorporation of the Des Moines Union Railway Company referred to in the amended bill had been adopted and that the two transactions were wholly and entirely independent of each other" (185); *(b)* to the testimony of F. M. Hubbell who made no "objection" to the articles and did not suggest the alleged amendments or rely on them (1075; 1098-1099-1100). "I do not think I attached any particular importance to those amendments as having any effect at all upon the value of the stock or upon the title held by the terminal company in the terminal property" (1081). "The purchasing committee made no representations to me concerning the title to the property. I never heard the title of the Des Moines Union Railway Company to the terminal property questioned until this suit was brought and I was made one of the defendants" (1078); *(c)* to the testimony of Cummins that he initiated the amendments (1206, 1210-1211) and his letter of January 27th, 1890, to Dodge that "while Mr. Hubbell was at first disposed to oppose the amendments which I had prepared after full explanation with him I believe that he will support them" and that "they are directed to two purposes, first, to clear up the ambiguity and uncertainty with respect to the amount of stock to be issued on account of the original purchase of the property, and, second, to enable the Des Moines Union Railway Company to act in all matters without the previous authority of three corporations" (1211-1212); *(d)* the implied agreement between Hubbell and the Wabash purchasing

committee arising from the contract between them that the committee "will consent to such change in said articles of incorporation as will permit one director of said company to be nominated by any person or corporation holding one-eighth of the stock of the said Union Railway Company" (1601-1602). This instrument was obtained by Hubbell in connection with the purchase of stock, and amounts to an agreement between the parties that the articles would not be otherwise amended; *(c)* the undisputed documentary evidence that Hubbell acquired the stock of the Wabash purchasing committee with the express understanding that the sale of the stock "should be made only to a railway company who will join with the Wabash in making a contract with the Des Moines Union guaranteeing interest upon the bonds, operating expenses, etc.," and "that it would be prejudicial to sell any of this stock to outsiders (see Hubbell's letter of June 18, 1888, to Ashley [1060] and Ashley's letter of June 16, 1888 [1059]), and that the "one-eighth interest in the capital stock" retained by the Wabash purchasing committee "shall be sufficient to represent a proprietorship in the company, according to the understanding we had when you were here" (see Ashley's letter of April 5, 1890, in reply to Hubbell's letter of April 1st, 1890 [1061]).

(2) That "for seventeen years thereafter (adoption of the alleged amendments) the railways acted in perfect harmony with the articles as amended. During that time there was no question of their validity and not until this suit was filed in 1907 was there any such attack. The doctrine of laches comprehends and controls the situation," contrary to the conceded fact that the railway companies during the seventeen years op-

erated their joint railroads and terminal facilities under and pursuant to and in compliance with the supplemental or operating agreement (150-159). Hubbell testified "the contract of May 10, 1889," had been executed before he "ever heard of any suggestion from any one respecting the amendment of the articles"; that the method of doing business "was not changed after the amendments"; that "the business was transacted and has been transacted ever since * * * under the contract of 1889" (1099). Hubbell did not claim the alleged amendments would affect in any way the railway companies or the operations of the joint railroads and terminal facilities until after the expiration of the supplemental operating agreement (see paragraph 25, Respondent's answer) (191), and the first time he advised any officer or agent of the petitioners or their predecessors that he claimed adversely to them was in 1905, and this suit was brought shortly thereafter (328-329), and contrary to the elemental rule that mere unwariness of a principal or the beneficiary of a trust can not be set up by an agent or trustee in support of an adverse claim against his principal or beneficiary.

(3) That the railway companies "through successive acts, natural enough, and at the time, apparently harmless (2115) * * * gradually let slip from them that exclusive ownership and control which they had at the beginning so much valued and so carefully guarded (2115)," but that **"there is nowhere any indication that the railways intended any such a result, and yet such, in our judgment, is the result.** This **unexpected outcome** was the product of several circumstances" (2113). The railway companies ex-

pressly contracted against adverse claims that they had relinquished their use and occupation of their joint railroads and terminal facilities, based either on the express acts or acquiescence or laches of their officers and agents, by the provisions of article 2 (127) of the articles of incorporation which prohibited the Des Moines Company from disposing "of the use of any part of its franchises" without "the assent in writing" of the railway companies, and by article 4 (128), which provides that "no contract, lease or other agreement amounting to a permanent charge upon the property * * * shall be entered into * * * by the board unless the same shall have been first approved by" the railway companies. The "board" could be composed only of nominees of the railway companies (128), and therefore these provisions directly limited the authority of the officers and agents of the railway companies who acted as their representatives on the board of the Des Moines Company and reserved to the respective boards of directors of the railway companies all authority relating to their rights to the joint use and occupation of their joint railroads and terminal facilities. Besides, no assertion or exercise of the corporate power of the Des Moines Company could destroy or affect in any way the property rights of the railway companies in their joint railroads and terminal facilities.

Third. That the Des Moines Company "must furnish its full terminal facilities in so far as reasonably necessary and required by the railways and they will pay therefor such reasonable sum as may be agreed upon between the terminal company and each of the railways, or in default of such agreement, as may be

fixed by the proper public tribunal" (2119); **but the Court of Appeals did not so decree** (2127). The learned Judge had previously stated, "that when the present operating contract is ended the rights of the parties respecting the use of the terminals by the railways are those which spring from their nature as carriers and their physical and business relation to each other as carriers in and entering a large terminal" (2119). The holding, "that the terminal company must furnish its full terminal facilities, etc.," is based on the assumption that the laws of Iowa require it to do so, contrary to the decision of the Supreme Court of that state in the case of Morgan v. Des Moines Union Railway Company, 113 Iowa 55-61, that the Des Moines Company was organized under the general railroad act of that state, which does not obligate corporations formed thereunder to afford their facilities to other companies except pursuant to their agreements.

The District Court held that the income in the treasury of the Des Moines Company and the joint railroads and terminal facilities belong absolutely to the Des Moines Company, but that the railway companies were entitled to use the joint railroads and terminal facilities on the payment of reasonable compensation to be fixed by the court in default of agreement of the parties (2036-2052; 2064-2065) and adjudged and decreed accordingly (2065). Both parties being dissatisfied prosecuted appeals (2068-2084).

The Court of Appeals entered an order and judgment (2127) requiring the District Court to modify its decree so as to "state the complete title to the property in controversy in the" Des Moines Com-

pany, and "that the only interest of the railway companies in the property or the management of the corporation is such as flows from stock ownership", and that "the income in the treasury of the company belongs to the railway companies".

On the ground that the decision that the title to the property in controversy is in the Des Moines Company and that petitioners have no right to use and occupy same, adversely affects the public interest (St. L., K. C. & C. R. R. Co. v. Wabash R. R. Co., 217 U. S., *l. c.* 251), is contrary to public policy (Central Transportation Co. v. Pullman Co., 139 U. S. 28, *l. c.* 29) (State v. Iowa Central Railway Co., 71 Iowa 410) (Section 2066 Statutes of Iowa) and violates the *quasi*-public and important private rights involved, petitioners submit that, in view of the division of the judges and the facts to which reference has been made as well as those referred to in the opposing opinions, the matter "is of sufficient importance and is sufficiently open to controversy to make it the duty of this court to issue the writ applied for" (LAU OW BEW, 141 U. S. 583, *l. c.* 587), review that decision and determine the claim of petitioners that the Des Moines Company holds their joint railroads and terminal facilities under and pursuant to the contract of January 2nd, 1882, and its articles of incorporation, subject to the joint use and occupation of the petitioners

at cost, to be shared between them in accordance with their respective use.

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